SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 292

UNITED MINE WORKERS OF AMERICA, DISTRICT 30, UNITED MINE WORKERS OF AMERICA, C. E. BEANE, JOSEPH CASTLE, JOSEPH DAVIS and NOBLE HOBBS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, United Mine Workers of America, District 30, United Mine Workers of America, C. E. Beane, Joseph Castle, Joseph Davis, Noble Hobbs,[1] and each of them, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered April 18, 1968 in Case No.

[1]Petitioners herein are referred to as follows: United Mine Workers of America as "UMW"; District 30, United Mine Workers of America as "District 30"; C. E. Beane as "Beane"; Joseph Castle as "Castle"; Joseph Davis as "Davis" and Noble Hobbs as "Hoobs". Unless otherwise indicated, all emphases herein are supplied.

Pagination references following the Symbol "R." are to the certified record filed in this Court's Clerk's office; "T." to the transcript of proceedings *before the Special Master; and "A." to the Appendix to this* Petition.

14,228, styled *National Labor Relations Board, Petitioner* v. *United Mine Workers of America and District 30, United Mine Workers of America, Respondents,* being "On Petition of the National Labor Relations Board for Adjudication in Civil Contempt", and wherein the Sixth Circuit affirmed, as modified and corrected, the findings of fact of its Special Master (United States District Judge Charles W. Neese) dated December 5, 1967, ordering Petitioners, and each of them, be held in civil contempt, that they purge themselves thereof by ceasing specified coercive conduct as to employees of Terry Elkhorn Mining Company, Inc., W. C. Mahan, d/b/a Mahan Coal Company and Harry Wright Construction Company, Inc.,[2] or of any other employer within District 30's territorial jurisdiction, and not violating in any other manner the Sixth Circuit's May 20, 1960 decree, and by posting notices and filing evidence of compliance, that they jointly and severally pay NLRB its court costs,[3] and further ordering that upon failure of the two Unions, or either of them, to purge themselves, "this Court hereby imposes a compliance fine of $25,000 and a further compliance fine of $1,000 per day on each of said respondents so long as such non-compliance continues" and in the event that either of the individual Petitioners violates the May 20, 1960 decree or the decree of April 18, 1968 "in the future, that each pay a fine of $5,000 or be confined to jail for a period of 30 days for each such violation", the foregoing fines and penalties to be "imposed only in the event" Petitioners fail, following entry of the decree, "to purge themselves of contempt" as directed therein. Future violations would be dealt with by such means as the Sixth Circuit deems appropriate, including

[2]Called "Terry Elkhorn", "Mahan" and "Wright", respectively.

[3]This amount to be fixed by the Sixth Circuit's further order after service and submission by NLRB of a statement of costs.

issuance of a body attachment against those responsible for noncompliance (A. 30-34a).

A certified copy of the transcript of the record in said case, including the proceedings in the Sixth Circuit, is furnished herewith in accordance with this Court's Rules.

OPINIONS BELOW

The Report of the Special Master, filed December 5, 1967, appears in Appendix A hereto (pp. 1a-22a) and in the certified record (R. 33).

The Sixth Circuit's opinion of April 18, 1968 appears in Appendix A hereto (pp. 23-29a) and in the certified record (R. 37). It is reported *sub nom. NLRB* v. *UMW et al.*, 6 Cir., 393 F.2d 265.

JURISDICTION

The Sixth Circuit's judgment was entered April 18, 1968 (A. 30-34a). This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Where a court of appeals' decree enjoined, pursuant to an NLRB cease and desist order, designated labor unions, their officers and agents, from coercing employees, and thereafter the Board seeks a civil contempt adjudication upon charges that the enjoined union through its agents have contemned the enforcement decree, did the court of appeals commit error in finding the alleged contemnors guilty on the ground that findings of fact by a Special Master are supported by substantial evidence on the record considered as a whole, and in failing to apply the standards of proof accorded to labor unions, their officers and others, in Section 6 of the Norris-LaGuardia Act (29 USCA 106)?

2. Does such enforcement decree enjoining coercive

picketing as to employees "of any employer engaged" in operations within the geographical limits of one of the union's territorial jurisdiction apply to (a) the operations of employers who admittedly were not in business when the enforcement decree was entered in 1960, (b) to an employer who was not a complaining party in the proceedings which occasioned the enforcement decree, and (c) to situations where there is no relationship between activities upon which the Board bases its charges of civil contempt and those which formed the basis of the court of appeals' enforcement decree in 1960?

3. Where the National Labor Relations Board seeks an adjudication of civil contempt against labor unions and their agents, based upon charges of coercive picketing, and a previous court of appeals' decree enjoined such picketing, is it error for the court of appeals to reject a defense of mootness and find the alleged contemnors to be guilty of civil contempt when the evidence affirmatively shows all picketing ceased prior to the Board's filing the civil contempt petition?

4. Under applicable law, did the evidence suffice to warrant the finding that Petitioners, and each of them, had contemned the Sixth Circuit's decree of May 20, 1960?

5. Is the Sixth Circuit's order of April 18, 1968 supported by applicable principles of law and evidence?

STATUTORY PROVISIONS AND RULES INVOLVED

Section 6 of the Norris-LaGuardia Act (29 USCA 106) and sections 2(13), 8(b)(1)(A) and 10(e), (f) and (h) of the Labor Management Relations Act, 1947, herein called "Act" [29 USCA 152(13), 158(b)(1)(A) and 160 (e), (f) and (h)] are involved, as is Title 18, USCA, Section 401.

Likewise involved are Rules 53(e)(2), 52(a) and 65(d), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. THE SIXTH CIRCUIT'S RULE TO SHOW CAUSE

1. Unions' Motion to Discharge and Vacate Show Cause Order Is Denied.

On *May 20, 1960,* the Sixth Circuit entered a consent decree directing UMW and District 30, their officers, agents, successors and assigns, not to restrain and coerce employees of any employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of District 30's territorial jurisdiction in the exercise of rights guaranteed them by the Act's Section 7.

Thereafter, on July 8, 1966, NLRB filed a Petition for Adjudication in Civil Contempt and for Other Civil Relief, alleging the two Unions, their officers and agents, particularly C. E. Beane, member of UMW's Executive Board and District 30's President, and Field Representatives Joseph Castle, Joseph Davis, Noble Hobbs and others should be held in civil contempt for violating, disobeying and failing and refusing to comply with the Court's decree of May 20, 1960 in connection with operations of Terry Elkhorn, Mahan and Wright (R. 4).

Responsive to the Sixth Circuit's order of July 8, 1966 that Petitioners specifically admit or deny, or meet by affirmative defense, each allegation of NLRB's petition, Petitioners, by motion to discharge and vacate the show cause order and dismiss NLRB's contempt petition, denied the accusation and asserted the petition's insufficiency in failing to show that the acts and conduct of which NLRB complained to the Court had any relation-

ship to activities and circumstances forming the bases of the Sixth Circuit's May 20, 1960 decree, and avowing, in fact, such activities refer to a new and independent set of circumstances, not in any wise related to the conduct which caused the Sixth Circuit to enter its May 20, 1960 decree and that, upon information and belief, neither Terry Elkhorn Coal Co., Inc. nor Harry Wright Construction Company conducted existing operations on May 20, 1960, and while M. C. Mahan then conducted an operation, it was a partnership operation and not one conducted as Mahan Coal Company.[4]

Additionally, Union's motion to discharge, etc. asserted that on July 8, 1960, NLRB's Regional Director, Ninth Region, advised Unions, by letter, of their compliance with the Board's order with which the May 20, 1960 decree was concerned and that NLRB's files "are hereby closed, and will be continued as closed cases so long as the present status of compliance continues" (R. 6); and Petitioners' charge that "no change in that status has occurred" stands unchallenged.

Thirdly, the same motion charged that NLRB sought, contrary to law, to have the Sixth Circuit act as a labor court in the first instance by virtue of its contempt powers, and supported their charge by exhibits (R. 6) showing that unfair labor practice charges were filed with NLRB on behalf of Terry, Mahan and Wright complaining that Unions were guilty of violating the Act's Section 8 (b) (1) (A)

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[4]These allegations in Petitioners' motion to discharge and vacate, supported by affidavit of Harrison Combs (R. 6), one of Petitioners' counsel, stand undisputed in the record. For contents of the Combs affidavit, see post, p. 30.

Subsequently, in the hearing before the Special Master, it was Stipulated (R. 30-V, Stipulation B) that neither Terry Elkhorn, Mahan, nor Wright "were charging parties" in the NLRB "proceedings which resulted in the" Sixth Circuit's "May 20, 1960 decree." For the period when these parties engaged in business, see post, p. 10.

[employee coercion] and Section 8(b)(7) [organizational and recognitional picketing]; and while an NLRB complaint issued to process the 8(b)(7) charge, no NLRB complaint issued to determine whether Petitioners violated 8(b)(1)(A), but instead, NLRB sought to have that question determined by instituting the instant contempt proceedings, although both violations involved a single circumstance of picketing; and NLRB did not deny it could have consolidated with the cases involving the alleged organizational and recognitional picketing the alleged coercive conduct matter involved in this proceeding.

The Sixth Circuit rejected Union's motion on October 7, 1966 (A. 36-37a), holding the contempt petition "alleges conduct" on Petitioners' part "which, if true, was proscribed by the Board's order" and noting that this Court upheld a similar order in *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, which does no more than sanction a broad NLRB order because no objection thereto had been urged before that Board.

B. PETITIONERS' ANSWER TO BOARD'S CONTEMPT PETITION.

Petitioners severally admitted the Sixth Circuit's enforcement of the NLRB order, but denied the allegation of having violated, disobeyed and failed and refused to comply with the May, 1960 decree (R. 9, 10). Petitioners severally conceded that each had notice and actual knowledge of its terms.[5] Answers filed by unions (R. 9, 10), admitting C. E. Beane's presidency of District 30 and his membership on UMW's Executive

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[5]Newberry's answer contained his denial, while Akers' denial came in an amendment to his original answer, permitted by the Master (T. 667). The Sixth Circuit did not hold either of them in contempt. (A. 26-27a).

Board, denied his having acted in concert and participation with other officers, agents, and members in the violations described in the contempt petition and the further allegation that "by reason thereof" Beane "is subject to the decree herein and responsible and liable for the United Mine Workers of America's and District 30's disobedience thereof and their failure to comply therewith." Both Unions allege that neither of them actually or otherwise participated in, or actually or otherwise authorized, the individual Petitioners or any other agent to engage in activities described in the contempt petition or that either ratified any act violative of the May 20, 1960 decree after actual or other knowledge thereof, although District 30 admitted that Petitioners Castle, Davis, Akers and Hobbs were its field representatives but denied they were agents of either UMW or District 30 in concert and participation with them in disobeying the 1960 decree as charged. Both Unions admitted J. D. Newberry's membership in Local Union No. 7788, an autonomous local union, but each denied his agency.

C. PETITIONERS RENEW DEFENSES; THE SIXTH CIRCUIT APPOINTS A SPECIAL MASTER.

Defenses asserted by Unions in motions above discussed were reiterated in Petitioners' answers, as well as in their respective Renewals of their discharge motions (R. 11). NLRB sought to have the Sixth Circuit strike these defenses from Petitioners' respective answers; NLRB opposed such renewal and sought the Sixth Circuit's appointment of a Special Master to consider and report upon issues in the contempt proceedings; in a January 3, 1967 order (R. 12, 14, 15), the Sixth Circuit appointed Honorable Charles G. Neese, District Judge, to hear evidence relative to the issues of fact raised by

the Board's petition "and as denied by" Petitioners in accordance with Federal Rules of Civil Procedure (R. 18), reserving action on NLRB's motion to strike portions of answers aforesaid and "All other matters", pending the Special Master's filing of his report (A. 37a, 46a).

D. THE PARTIES DISAGREE ON THE STANDARD OF PROOF REQUIRED TO FIND PETITIONERS GUILTY OF CIVIL CONTEMPT.

In Proposed Findings of Fact and Conclusions of Law (R. 29, pp. 24 *et seq.*), Petitioners pressed upon the Special Master that whether the Sixth Circuit's 1960 decree had been contemned was to be determined by standards found in Norris-LaGuardia's Section 6 (29 USCA 106). NLRB argued that since the contempt proceeding was civil, its burden was met by "clear and convincing evidence" which *Kansas City Power & Light Co.* v. *NLRB*, 8 Cir., 137 F.2d 77, 79, defined as "something more than a bare preponderance of evidence"; and it urged responsibility was to be determined by the common law rules of agency under the Act's Section 2(13) [29 USCA 152 (13)][6]

E. THE FACTS

1. 1960 Decree

A consent decree, entered by the Sixth Circuit on May 20, 1960, enforced an NLRB order which directed Union Petitioners not to "restrain and coerce employees . . of any . . employer engaged in coal mining operations or in processing, transporting and/or distributing coal within the geographical limits of the territorial jurisdiction of District 30, United Mine Workers of America . . by engaging in and/or participating in conduct more fully described below:

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[6]These and other statutory provisions, as well as pertinent Rules of Civil Procedure, appear in Appendix F, pp. 47-51a.

"(a) Exerting force or committing acts of force and violence against said employees, injuring the person or damaging the property of said employees, threatening said employees by following them in superior numbers, using or threatening to use force or violence against said employees, assaulting employees, attempting to assault employees, threatening them with reprisals, barring their ingress to or egress from their places of employment, preventing them physically from working or in any manner restraining or coercing them in the exercise of said rights" (A. 35a).

2. The Charging Parties

Terry Elkhorn, *incorporated March 2, 1964,* mined coal by strip and auger methods at two locations in Floyd County, Kentucky, which was hauled by Wright, an independent contractor, operating a fleet of trucks under contract with Terry Elkhorn, although Wright drove one of the trucks (T. 151-52). One of the tipples to which Wright hauled the coal had been constructed by Mahan who began its operation in October, 1964 (T. 208; A. 2-3a), although Mahan testified he had been in coal business since 1959 (T. 207).

Neither Terry Elkhorn nor its principal stockholder, nor Mahan, nor Wright was a charging party in any of the NLRB proceedings which resulted in the Sixth Circuit's decree entered May 20, 1960 (see Stipulation B filed with the Special Master, R 30-V).

These operations were within the geographical limits of District 30's territorial jurisdiction.

3. The Petitioners

District 30 is a non-autonomous, provisional district, established in accordance with Article III, Section 2,

[7]See Stipulation D, filed with the Special Master (R. 30-V).

Constitution of the International Union.[7] It has no constitution or by-laws of its own and is governed in accordance with the International Constitution.

All collective bargaining agreements entered into with employers on behalf of union members are negotiated and executed by the International Union at the direction of its Policy Committee. Neither District 30, nor any local union within its jurisdiction, has the power to enter into such agreements.

District 30's officers are appointed by the International President for unspecified terms and are directly accountable to the international. Their salaries and expenses are fixed and paid directly by the International and they receive no financial benefits out of District 30's funds. No District 30 officer or agent is appointed or elected by a membership vote.[8]

The International President appointed Petitioner Beane as President of District 30. Petitioners Hobbs, Castle, Davis and Akers were Field Representatives of District 30. Though a member of a local union, Akers was not employed by UMW or by District 30, but by coal companies, until he became a District 30 Field Representative in 1965.

With the exception of Akers, the officers and field representatives were employed by District 30 in 1960, and had notice of the Sixth Circuit's 1960 decree. Akers, not employed by District 30 until 1965, had no knowledge of events leading to the Sixth Circuit's decree (T. 653-55). Newberry had no knowledge of such events (T. 496-97), though admitted he recalled the trouble in 1959 regarding the contract dispute (T. 517-18).

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[8]See Stipulation D, filed with the Special Master (R. 30-V).

4. The Facts Concerning the Alleged Unfair Labor Practices and the Alleged Contemptuous Conduct

Almost all coal mines in Floyd County, Kentucky, were under UMW contract. Several months prior to March 31, 1966, Field Representative Hobbs first became aware that Terry Elkhorn was unorganized when some of Mahan's and Terry Elkhorn's employees asked local union members for membership cards, and executed and returned them to the local union (T. 472-73). Because several members asked that something be done, on March 31, Hobbs and Castle met 10 or 12 men, among them a UMW pensioner and another not identified, and Terry Elkhorn employees, and later drove to the Mahan tipple (T. 559, 560, 573). Other incidents occurred at the Lick Branch mine, at the Sun Valley tipple, at the Pure Oil station and along U.S. Route 23.

Incidents at the Mahan Tipple

Hobbs parked his car in front of Patton's Store; Castle drove his car behind the store. Their arrival found 30 to 40 men already picketing (T. 561, 565, 620), as well as Kentucky state police who, like Castle, had parked their cars behind Patton's Store.[9] Terry Elkhorn's President Hovatter, arriving near the tipple, claimed two cars blocked the roadway, one of which was Castle's. Asking them to move the cars, Hovatter claims Castle made no effort to do so, so he asked Mahan to get the license numbers and swear out a warrant for their arrest (T. 126-29). When Mahan sought the license numbers Castle had already moved his car at state police request (T. 571-72, 603, 606). Though Mahan claimed when he tried to write

[9]Witnesses estimated 35 to 40 men present, consisting of employees from other mines living in the area, former mine employees on pension from UMWA Welfare and Retirement Fund, as well as sight-seers (T. 559-65, 615-19). Mahan's estimate of 100-150 pickets (T. 210) is countered by Hovatter's estimate of 60 (T. 127).

down the license number, Castle tried unsuccessfully to grab the paper from him (T. 127, 211), Castle avowed that when Mahan asked whose car it was, Castle admitted ownership (T. 618). Hovatter and Mahan then left the area to obtain Castle's arrest.[10]

Both Hobbs and Castle (T. 619) claimed that upon arrival at the tipple coal was being run (T. 561); no trucks were parked; when one truck was flagged and the driver, stopping his truck, talked to some pickets and signed a union card, other drivers then parked behind him, several of whom signed union membership cards (T. 566-67, 600). This caused the trucks to begin stacking up and operations were shut down for a while (T. 600-01).

Upon Mahan's return to the tipple, the pickets were gone and his employees refused to continue working that day (T. 212). Mahan operated the tipple himself, unloaded nine trucks and quit for the day (T. 212).

Leaving the tipple about 10:00 a.m., Hobbs went to the Terry Elkhorn strip pit, parking his car at the bottom of the hill. Some 12 or 15 men, including two or three Terry Elkhorn employees, walked to the strip pit where a UMW pensioner (John Marshall) advised the foreman they were interested in getting the men to join UMW, and asked and received permission for him to talk to the men (T. 573-75). The foreman shut down the job and the men asked employees to sign a card, which three of them did, while one said he was afraid because he "didn't know what was going to happen", but then signed a card. Some employees indicated disinterest (T. 573-75).

Hobbs was at the Mahan tipple for a short time on April 2, but did not think the tipple was operating. The

[10]Mahan claimed nothing was done concerning the warrants because "the Trial Judge told me that the trial could come up May 15th, and they had the trial April 15th" (T. 229-30).

Mahan tipple did not operate on Sunday, April 3, but reopened on April 4. Again, a large number of men assembled in the area between Patton's Store and the tipple, and these included Castle, Hobbs, Davis and Akers (T. 218, 539, 576, 607). According to Mahan, Akers and Davis asked him why he wasn't a good fellow and to go ahead and sign a union contract, which was refused (T. 218). Castle sought to have a state police go with him to see if he could talk to Mahan; the state police refused. According to Castle when, on this occasion, he advised Mahan that three or four employees had signed cards and asked Mahan to sign a contract, Mahan refused (T. 540-42). In a conversation with Hobbs on this occasion (April 4), Mahan told Hobbs he did not want them to organize his mine, which brought Hobbs' reply that was his job and they were going to try to organize peacefully and lawfully (T. 576-77). Mahan also charged when he went to drop a railroad car down to the loading point pickets prevented a tipple employee from doing so (T. 218); Hobbs stepped between two railroad cars, preventing Mahan from uncoupling the cars; he and Hobbs pushed each other; and when pickets closed in on Mahan and one grabbed a pinch bar from him, Hobbs instructed him to give it back (T. 218-19).

An employee testified that Hobbs asked him to join the union and sign a union card (T. 389), and Wright (a charging party) related that Hobbs and Newberry asked him to join the union, pull his trucks off, but he refused (T. 155). Davis admitted asking Wright to sign a card and asking him to get the truck drivers together for a meeting (T. 538). Wright attributed to Akers the statement that "This will be Union coal dumped here if you work any more" (T. 156), but Akers' version of the incident shows that he asked Wright to sign a union card

and told him if coal was dumped there he "hoped" it would be union coal (T. 650-51). Though nails were scattered around the tipple area, there is no evidence as to who put them there. Hobbs and Akers denied knowledge of how the nails got scattered around (T. 580, 658-59); both picked the nails up and asked "some of the boys" to help pick them up (T. 547-48, 580, 651-52).

Mahan admitted offering to stop operating the tipple until after a Floyd County Circuit Court injunction hearing the following day; after talking "to the Union men", in five or ten minutes he came back with an acquiescence (T. 220). Between 10:30 a.m. and 1:00 p.m., the tipple ceased operating and was closed down for the remainder of the day (T. 577, 579).

The mines and tipple did not operate on April 5—the day for the Floyd County Circuit Court injunction hearing (T. 219-20).

Mahan estimated on April 6, 400-500 men were at the tipple (T. 222). Wright charged Akers told him he did not want to see him hurt but would like him to park his truck (T. 156), and that as he pulled away from Akers someone in the crowd called out that he had better park it, threatening to burn both his truck and trailer and to "beat you down beside of them" (T. 156-57). Akers' version is that he told Wright he could pay a decent wage, that Wright offered to sign a union card "if you will pay for my truck", to which Akers replied he could not do that (T. 650).

The tipple did not work on April 5 and 6, and only for a short time on April 7. Mahan testified his men told him they were frightened and, after operating three or four days, they refused to work (T. 222-24).

District 30's President Beane was in Washington, D. C. with regard to contract negotiations beginning March 30 and had no knowledge of any picketing until about April 4 or 5 (T. 523-26). A number of miners in District 30 had gone on strike when their employers had not executed a successor contract to the one which expired April 1, 1966 (T. 530). By April 7 or 8, UMW had negotiated a contract with Peabody Coal Co. but had been unable to reach an agreement with operators in District 30. (T. 525-26). Returning from Washington, on April 9 Beane held a meeting of local union officers to explain the Peabody agreement's terms and advised them, as well as field representatives, to do what they could to get the employees to return to work pending further negotiations with operators in District 30 and to cease all picketing, including Terry Elkhorn's operations (T. 339-41). To get a larger crowd another meeting was arranged for, at which Beane again on April 11 advised the members to return to work but they were not successful until sometime later in the month (T. 337-46, 524-33). Some striking miners were among those participating in picketing of Mahan and Terry Elkhorn. No district representative appeared at the tipple or at Terry Elkhorn's operations after District 30's President Beane on April 9 and 11 advised roving pickets and others *to discontinue all picketing* (A. 9a).

The tipple resumed operations the latter part of April or early May (T. 222-23).

Following a three-week shut down, Mahan sought to operate his tipple again early in May (T. 222-23). Pickets —though *not any field representative*—were present. On one occasion, Mrs. Mahan testified to an incident when, going with her husband to the tipple, approximately 100

people yelled at the watchman. When an *unidentified* individual made an improper remark, Newberry admonished him not to make such remarks; and Mrs. Mahan credited Newberry with the statement that the tipple would not operate the next day, adding, "I will guarantee that." Whereupon, one Hayden, *not otherwise identified,* claimed to have the kerosene, while another *unidentified* individual claimed to have the match, and still another *unidentified* person declared, "if that doesn't work, I have the dynamite" (T. 249-51). She also attributed to an *unidentified* person the statement, "Mahan, before I die, I am going to kill you" (T. 251). Newberry denied the remarks Mrs. Mahan attributed to him (T. 479-81).

On May 17 *women* and *children* blocked coal trucks so as to impede them from getting to the tipple; *school children* let air out of Mahan's watchman's tires and surrounded the car when he attempted to leave (T. 224-25); and state police led the watchman's car through the women and children, and on that occasion Mahan saw a *union member* who had frequently been on the picket line (T. 225). A state police observed that "the school kids blocked the roads, blocked the coal trucks, and the parents were there, present with them, helping them to do it" (T. 109).

According to Terry Elkhorn's president, pickets were at the tipple up to May 17, the last day the tipple operated (T. 133).

There was testimony also that a watchman was shot at and someone threw rocks and fire crackers from the bushes (T. 274-78), and the latter part of May several holes were burned in the ramp (T. 265) and a week later a crusher was destroyed by an explosive (T. 265,

268). No witness identified the person or persons responsible for these activities.

Picketing at Lick Branch

Picketing which started at Lick Branch on March 31 ceased, as the Master's narrative states (A. 13a), "After a visit to the picket line at Lick Branch by Mr. Hobbs, all those assembled, except one picket, departed the scene behind the Hobbs vehicle" and "A Kentucky state policeman was then advised by a picket that the picketing would be halted" (A. 13-14a). On several occasions field representatives and Newberry stopped to talk to pickets as they drove by (T. 379, 445, 446, 610).

About April 6 a retired coal miner, by agreement with Terry Elkhorn employees, prepared a sign reading "UMW of A pickets" (T. 337), which was displayed at Lick Branch. Petitioners had nothing to do with its preparation or display (T. 444). Pickets were employees of other coal companies in the area, of Terry Elkhorn and Mahan, as well as pensioners. On several occasions these pickets threw rocks at trucks (T. 351-52, 371-73). Wright charged that, on April 8, Castle threw a rock at Wright's truck and other pickets joined in the rock throwing (T. 154, 168); but Castle denied the charge, and while a large number of state police were present, they did not testify to such an incident or any report of it. The lack of verification by state police or other independent witnesses beclouds Wright's charge. When Wright claimed he was assaulted on April 19, he failed to identify his assailants (T. 168-69).

There was evidence of rock throwing incidents on April 8, 11 and 19 (T. 56, 99, 351-52, 371) and other acts of violence (T. 414), name calling (T. 57, 107-08, 352, 390), and pickets were accused of throwing nails in front of trucks (T. 90-91, 107, 390-91,

394, 398) causing several flat tires (T. 399), but there is also testimony that one of Terry Elkhorn's drivers threw tacks under a truck on one occasion (T. 391).

On April 20 Newberry paid cash to a radio station to announce a meeting of "UMW, District 30" near Prestonsburg, Kentucky.[11] While there is evidence that more than 500 pickets were at Lick Branch, Newberry admitted the announcement was made but testified that no meeting was held because "there wasn't but one or two there of the boys showed up," and the meeting was called off (T. 496).

Despite such evidence, other than the April 8 incident when Wright accused Castle of rock throwing, all other evidence fails to identify any picket who committed any wrongful act or to show that pickets' presence on the picket line was at the request of either of Petitioners.

The Incident Along U. S. Route 23

A company employee related after April 4 he led truck convoys from the mine to the tipples in groups of 5 to 20 trucks (T. 414); on one occasion a car passed and a driver, identified only as Theodore Warrix, Jr., held up a gun for him to see. There was also testimony of activities by *unidentified* persons who tried to wreck the trucks (T. 418), as well as evidence that one car containing six *unidentified* men passed a truck, and one of whom—also *unidentified*—pointed a rifle out of the car window (T. 373), while another witness related an *unidentified* person waived a dynamite stick out of the car window as it passed the truck (T. 379-80).

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[11]See Stipulation A filed with the Special Master (R. 30-V).

Picketing at Sun Valley

Terry Elkhorn's tipple foreman related that Joe Castle, together with 100 pickets, came to the operation on April 4, and credited Castle with the statement that "I just couldn't work any more, or wouldn't" (T. 312), and related that Newberry stated "We would like to have you join us" (T. 313). The group remained there for about one-half hour. According to the tipple foreman, when Castle told him that he could empty the bin "if I would shut down", the witness related, "this I wouldn't agree to" (T. 314).

Terry Elkhorn's secretary related that on April 9 Castle came to the Sun Valley tipple with 70 to 100 pickets who remained for an hour or more talking to employees (T. 295-98). On April 20, she related, seeing a white car going up the highway from the tipple and saw flames over the coal hopper (T. 299).

The Pure Oil Station Incident

An incident admitted in evidence related to a truck driver whose tire picked up a nail and went flat as his truck passed pickets at Lick Branch, causing him to go to a Pure Oil station for repairs. On the same occasion, Newberry came to the station with bad brakes on his car (T. 284). A group of *unidentified* persons asked the truck driver what his trouble was and, stating it was a flat tire, one of the *unidentified* men told him to dump the coal in his truck and the *unidentified* persons then tripped the truck's tailgate (T. 189); one threw a sledge hammer into the windshield while others grabbed and assaulted him (T. 189, 193-94). A person identified as George Vaughan was identified as the man who assaulted him (T. 191-92).

F. THE SPECIAL MASTER'S HEARING AND HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Special Master took testimony on June 1, 2, 5 and 6, 1967.

Although NLRB introduced no evidence that either UMW or District 30 actually authorized, or participated in, any conduct prohibited by the 1960 decree, or ratified such conduct after actual knowledge thereof, the Master recommended to the Sixth Circuit that Petitioners be found guilty of civil contempt, finding they "clearly, unequivocally and convincingly participated, or were interested in" the labor dispute and as UMW agents, "committed, or constructively ratified, unlawful acts within the meaning of" Norris-LaGuardia's Section 6; that UMW, through the individual Petitioners and Akers and Newberry, violated the 1960 decree within the Sixth Circuit's jurisdiction by acts of violence upon employees of Elkhorn, Wright and Mahan, inflicting damage to the employers' properties, barring ingress to and egress from the employees' places of employment and other acts, and "by restraining and coercing such employees" in the exercise of rights guaranteed by 29 USCA 157—all prior to July 8, 1966, when the contempt petition was filed (A. 14-15a). Further, though acknowledging that Rule 65, Federal Rules of Civil Procedure, specifically required *actual notice* of an injunction order, but to hold UMW responsible for conduct of Newberry and Akers, he first imputed to them UMW's knowledge because it "neglected to communicate" such knowledge to them and then imputed liability to the Union for their alleged contemptuous conduct (A. 17-18a).

In conclusions of law recommended by the Master, UMW and District 30 were held to comprise the same

legal entity; and expressing the belief that "Only ordinary evidence was required to establish the authority" of individuals to act as UMW agents "in performing their respective specific acts", the Master concluded that UMW "was *vicariously responsible*" for acts of Beane and the field representatives (A. 18a, 19a).

The Special Master rationalized that because Beane was officially responsible for conducting UMW's affairs in District 30 and because he was apprised of the writ directed to UMW and District 30 but "failed to take appropriate action within his power to inspire the performance of the union's duty thereunder", Beane, as well as "the union itself", is guilty of disobedience. (A. 21a).

The Master concluded that the various acts of misconduct attributed to the individual Petitioners, other than Beane, violated the 1960 decree, as well as 29 USCA 158(b)(1)(A), and that such individuals "instigated unlawful conduct on the part of other persons, and each is liable for the actions of those whom he induced to act unlawfully", declaring "A person is chargeable for the 'foreseeable consequences of his conduct' " (A. 21a).

G. IN AFFIRMING THE MASTER'S FINDINGS WITH MODIFICATIONS, THE SIXTH CIRCUIT ADOPTED A STANDARD OF PROOF AT VARIANCE WITH THE REQUIREMENTS OF NORRIS-LaGUARDIA'S SECTION 6, AS WELL AS THE STANDARD RECOMMENDED BY THE MASTER.

Upon submission of the Special Master's report to the Sixth Circuit, as well as NLRB's corrections and objections thereto (R. 34) and UMW's objections thereto (R. 35), together with supporting briefs, the Sixth Circuit, upon "the entire record" concluded that the Master's findings "should be modified and corrected in the particulars set forth in the proposed corrections filed by" NLRB and that said findings of fact, as modified and

corrected, should be approved and confirmed in all respects (A. 26a). Whereas the Master concluded that proof against the "aforenamed agents" of UMW "of the aforementioned violations met the requisite modicum of establishment by clear and convincing evidence" (A. 16a), the Sixth Circuit held that "said findings of fact are supported by substantial evidence on the record considered as a whole." Its decision or opinion contained a copy of an order dated April 18, 1968, in which it adjudged in civil contempt each of Petitioners (A. 26-29a, 30-34a), and ordered that they purge themselves thereof by ceasing and desisting from restraining and coercing employees of the three complaining employers "or of any other employers engaged in coal mining operations . . within" District 30's geographical limits in the exercise of their Section 7 rights by specific conduct or "in any other manner restraining or coercing said employees in the exercise of said rights" and "Violating in any other manner this Court's decree of May 20, 1960; provided, however, that this order shall not be construed as prohibiting lawful and peaceful picketing." Other portions of the order, already discussed (*ante*, p. 1-3), appear at pages 28-29a of Appendix B herein.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S OPINION AND JUDGMENT THAT FINDINGS OF FACT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE IS THE PROPER STANDARD OF PROOF IN A CIVIL CONTEMPT PROCEEDING INSTITUTED BY NLRB AGAINST A LABOR UNION AND OTHERS IN A LABOR DISPUTE CONFLICT WITH AN EIGHTH CIRCUIT DECISION, THEY COLLIDE WITH EXPRESS LANGUAGE OF THE ACT, AND THEY ARE IN CONFLICT WITH THIS COURT'S PRIOR IMPORTANT DECISIONS WHICH HOLD THAT NORRIS-LaGUARDIA'S SECTION 6 REPRESENTS THE PROPER STANDARD FOR DETERMINING RESPONSIBILITY.

The Sixth Circuit's holding that "findings of fact . . supported by substantial evidence on the record considered as a whole" is the proper quantum for standard of proof for

finding a labor union and its agents guilty of civil contempt in a proceeding instituted by NLRB collides with the Eighth Circuit's holding in *Kansas City Power & Light Co.* v. *NLRB*, 8 Cir., 137 F.2d 77, 79, stating, "The rule as to the quantum of evidence in civil contempt proceedings is in no way affected by the situation that such proceeding is in connection with an enforcement decree of an order of the Board." Though the Sixth Circuit's Opinion does not so recite, it is evident it has employed the standard found in the Act's Section 10(e) and (f) which accords a conclusive factor to NLRB findings "if supported by substantial evidence on the record considered as a whole" in enforcing, modifying, and enforcing as so modified an order of NLRB. Even where the contempt proceeding does not involve a labor union, *Kansas City Power* required that the contempt be proved by clear and convincing evidence rather than a "bare preponderance."

In the Sixth Circuit, NLRB argued that since the contempt proceeding arose under the Act, Norris-LaGuardia's Section 6 does not apply; and with this conclusion the Sixth Circuit apparently agreed. However, the Act's language nullifies NLRB's contention and the Sixth Circuit's holding. The fact that Section 10(e) and (f) empowers courts of appeals to enforce NLRB orders and conjoins with such power a conclusiveness where NLRB findings are "supported by substantial evidence on the record considered as a whole" emphasizes Congress' clear intent to limit court of appeals' enforcement to situations which involve the problem of whether NLRB findings were so supported. It stresses the lack of Congressional intent and purpose, as well as language, to include enforcement of an NLRB order which has been translated into a court of appeals' order.

While Congress made clear that Norris-LaGuardia's Section 6 was inapplicable where appellate courts dealt with relief sought by NLRB under Section 10 (29 USCA 160), the Act's language discloses firmly that Section 6's inapplicability was limited to those instances delineated in Section 10 (29 USCA 160). Section 10(h) [29 USCA 160(h)] reads:

> "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, *as provided in this section*, the jurisdiction of courts sitting in equity shall not be limited by sections 101-115 of this title."

Thus, it is manifest that Congress' pattern of rendering inapplicable the provisions of Norris-LaGuardia's Section 6 was limited, as Section 10(h) reads to the power granted courts of appeal "as provided in this section".

While admittedly *Gompers* v. *Buck's Stove and R. Co.*, 221 U.S. 418, 446, regards a proceeding in civil contempt as part of the original proceeding in the court of appeals, it does not follow therefrom that the substantive standard of conduct is measured by the statute dealing with unfair labor practices. Concurrence with this proposition came in *Kansas City Power & Light Co.* (137 F.2d 79).

Indeed, contempt proceedings do not derive from the Act itself but from courts' inherent power. Notably, it is not NLRB's order which is being enforced in a civil contempt action but that of the court of appeals—in the instant case, the Sixth Circuit. NLRB's authority to seek enforcement of its order and the Sixth Circuit's power to enforce became *functus officio* under the statute

when the Sixth Circuit entered its May 20, 1960 decree. Historically, this Court and other federal courts have fashioned rules pertaining to alleged contempts on a basis unrelated to legal principles involved in litigation leading to an order which allegedly has been contemned. Indeed, this Court and other federal courts[12] have cautioned federal courts to use the extraordinary power of contempt with the utmost sense of responsibility and circumspection. Thus, it becomes crucial for the Court to recall that in the instant contempt proceeding's inception, Union Petitioners sought unsuccessfully to have the Sixth Circuit reject jurisdiction on the ground that NLRB was already processing a companion case to that which it submitted to the Sixth Circuit in the contempt proceeding. Thus, had the Board processed the companion case, Section 10 would have been applicable. Over Union objections NLRB persisted in the contempt proceeding; it thereby waived its right to have adjudication under the Act and it thereby placed itself in a posture where Norris-LaGuardia's Section 6 applied.

Indeed, *UMW* v. *Gibbs,* 383 U.S. 715, 736, recognizes that the legislative history indicates that Congress did not repeal Section 6 outright "but left it applicable to cases not arising under the new Act." As already noted the instant contempt proceeding is not one which arises "under the new Act."

The Sixth Circuit declared in *NLRB* v. *Deena Artware, Inc.,* 6 Cir., 261 F.2d 503, the inherent power to punish for contempt may be limited by Congress, and Congress did so limit that power in its enactment of 18 USCA 401. Congress also placed another limitation

[12] *Green* v. *U. S.,* 356 U.S. 165 (1958); *U. S.* v. *Galante,* 2 Cir., 298 F.2d 72 (1962); *NLRB* v. *Standard Trouser Co.,* 4 Cir., 162 F.2d 1012 (1947); *Nelson* v. *Steiner,* 7 Cir., 279 F.2d 944 (1960).

upon the courts' inherent power to punish for contempt by providing that in labor disputes the standard of proof, both as to labor unions and to individuals, officers and members charged with contempt, shall be, as Norris-LaGuardia's Section 6 mandatorily dictates, only upon "clear proof of *actual participation in, or actual authorization of*", illegal acts of individual officers, members or agents, or "of ratification of such acts *after actual knowledge thereof.*"

One of the basic purposes of Section 6 was to insulate labor unions against responsibility for the unlawful conduct of their members, agents, employees and officers. It contemplated that actual, not theoretical, culpability or complicity could provide a basis for responsibility. Repetitive use of the word "actual" in the congressional enactment under consideration undeniably evidences the intent of Congress that responsibility for unlawful acts should rest upon factual realities and not juristic imputations.

Brotherhood of Carpenters v. *U.S.*, 330 U.S. 395, 401, emphasizes Section 6's applicability in holding its provisions binding upon *all* courts of the United States and

> ". . . *its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.*"[13]

[13]Of cases cited by NLRB (Main Brief, p. 24) to support its position, only *NLRB* v. *Local 5881, UMWA*, 6 Cir., 323 F.2d 853 (1963) involved a labor union but no question concerning Norris-LaGuardia's Section 6's applicability was raised in that case.

The Sixth Circuit's error is made manifest by this Court's rationale for Section 6 as expressed in *Gibbs* (383 U.S. 736-37) on the issue of liability:

> "The driving force behind § 6 and the opposition to § 303, even in its limited form, was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control."

Petitioners do not, as NLRB stated to the Sixth Circuit (Main Br. 57) employ *Gibbs* for the proposition that Section 6 sets the standard "for proving agency" and it is likewise evident NLRB misreads *Gibbs* in its statement that *Gibbs* specifically noted that to determine agency the Act's Section 2(13) [29 USCA 152(13)] controls. To the contrary, *Gibbs* is cited by Petitioners as authority that a union's and an individual respondent's responsibility and liability are to be measured by Section 6's standards. Thus, if Section 6 were implemented, the Union Petitioners could not be held responsible since NLRB offered *no evidence* of actual participation in or actual authorization of the unlawful conduct, or ratification thereof after actual knowledge thereof.

Examination of the Master's factual narrative (A. 2-14a) shows that Beane, on April 9 and again on April 11, 1966[14] held a meeting with some pickets and on each occasion advised those assembled "to discontinue all picketing" (A. 9a). Yet in findings approved by the Sixth Circuit it found that the Union Petitioners, as well as Beane and the field representatives, "clearly, unequivocally and convincingly participated, or were interested, in the aforementioned labor dispute, and as

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[14]Unless otherwise indicated, all dates herein refer to the year 1966.

agents" of UMW "committed, or constructively ratified, unlawful acts within" Norris-LaGuardia's Section 6 (A. 15a). As for Beane, the Master concluded that the Sixth Circuit's 1960 decree was a command to Beane, who was officially responsible for the conduct of the affairs of "UMW in its District 30"; that he was apprised of the writ "and failed to take appropriate action within his power to inspire the performance of the union's duty thereunder" and that "he, no less than the union itself, is guilty of disobedience" (A. 21a). Thus, it is obvious the Sixth Circuit's holding imputes to one agent alleged illegal conduct of another agent, even though Beane had no knowledge of alleged illegal conduct. It must be recalled that the issue here was whether Beane had contemned the May, 1960 decree. The picketing itself was not violative of that decree. No evidence supports that Beane ever knew that any acts were considered illegal by NLRB until after the instant proceeding was filed. Beane's liability is clearly erroneous when measured by Section 6's standards. The Sixth Circuit's holding and judgment herein that the Union Petitioners, as well as Beane, contemned its order are in conflict with the foregoing discussion.

Since the other individual Petitioners were held to have contemned the 1960 decree because, as the Master stated, they "instigated unlawful conduct on the part of other persons, and each is liable for the actions of those whom he induced to act unlawfully", (A. 21a) and as UMW agents "committed or constructively ratified, unlawful acts" (A. 15a), it is obvious that the Sixth Circuit did not apply Section 6's provisions for determining their responsibility.

Judicial authority admonishes that "repeals by implication are not favored", especially where the Norris-La-

Guardia Act is not a forgotten one, but is a significant piece of legislation which Congress had specifically in mind when it enacted the Act (*A. H. Bull Steamship Co.* v. *Seafarers' International Union, etc.*, 2 Cir., 250 F.2d 326, 330, cert. den. 355 U.S. 932).

II. THE SIXTH CIRCUIT'S OPINION AND JUDGMENT AND ITS ORDER DENYING UNIONS' DISCHARGE MOTION ARE IN CONFLICT WITH ITS OWN PRIOR OPINION, WITH THOSE OF THE FIRST AND NINTH CIRCUITS, AND WITH THE RATIONALE OF A PRIOR IMPORTANT DECISION OF THIS COURT. THEY BOTH ACCORD AND CONFLICT WITH THE SECOND CIRCUIT'S VIEWS. THIS COURT SHOULD SETTLE THE CONFLICT.

One of the issues reserved by the Sixth Circuit in its order of October 6, 1966 and its order of reference of January 3, 1967 (see Appendix E., A. 46a) pertained to the court's jurisdiction and the contempt petition's sufficiency on the ground that the acts of which NLRB complained therein had no relationship to activities and circumstances forming the bases of the Sixth Circuit's 1960 decree and that such activities referred to a new and independent set of circumstances not in anywise related to the conduct which occasioned the Sixth Circuit's entry of its 1960 decree.

The Harrison Combs affidavit, supportive of the motion to discharge, states (See R. 6, Exhibit I, p. 2):

> "I have participated in numerous cases which involved the same alleged activities with which the Board's Complaints were concerned and know that such alleged activities related primarily to picketing which arose due to the refusal by coal operators mining coal in the Commonwealth of Kentucky to sign the National Bituminous Coal Wage Agreement of 1950, as amended effective September 1, 1958, because of the inclusion therein of the 'Protective Wage Clause'. Said 1950 Agreement was again amended effective April 2, 1964 and, as so amended,

did not carry forward said 'Protective Wage Clause'.

and

> "The various alleged acts of which the Board now complains as set forth in said Petition are in no wise related to or connected with the dispute between Respondent Unions and operators in said Board cases nor are they based upon or due to the Protective Wage Clause . ."

Its recitals were not denied.

The record establishes that Terry Elkhorn did not begin its business until after *March 2, 1964* and that its principal stockholder, Charles Hovatter, was not doing business in Kentucky prior to June, 1960, (T. 121; see Stipulation B filed with the Special Master); that since 1959 Mahan has engaged in coal mining operations under the name of Mahan Coal Company (T. 207, 227-28) and in October, 1964, entered into an agreement with Terry Elkhorn to construct and operate a tipple at Auxier, Kentucky, exclusively for Terry Elkhorn coal; that since February 15, 1966, Wright has been engaged by Terry Elkhorn to transport coal by truck from its mines to points of processing (T. 151, 245); and that neither Terry Elkhorn, Hovatter, Mahan, nor Wright was a charging party in NLRB proceedings which resulted in the 1960 decree (see Stipulation B filed by the Special Master).

The Sixth Circuit did not act upon the matters reserved by it, but permitted its previous orders to stand, and entered its order holding Petitioners in contempt. Thus, in so doing, the Sixth Circuit's opinion and judgment and its order denying Unions' discharge motion are in conflict with the Sixth Circuit's own prior opinion, with those of the First and Ninth Circuits, and with the rationale of a prior important decision of this Court. However, cases in the Second Circuit both accord and

conflict with the Sixth Circuit's holding herein. Petitioners submit that this Court should settle the conflict because of the obvious importance to organizations involved in labor disputes, whether labor or management.

Though NLRB's petition correctly alleges the Sixth Circuit entered its decree enforcing in full a Board order, both allegations and proof failed to show any relationship between the dispute and activities of which NLRB now complains and upon which it premised its civil contempt charge and those which formed the basis of the Sixth Circuit's 1960 enforcement order.

That such a connection is a *sine qua non* to a civil contempt charge and finding was the Sixth Circuit's holding in *Tosh* v. *West Kentucky Coal Co.*, 6 Cir., 252 F. 44 (1918). *Tosh* involved a charge that a district court's injunction entered in 1907 had been contemned by activities occurring in 1917; but the Sixth Circuit declared (252 F. 49):

> "We find nothing in either allegations or proofs indicating that the strike *of 1907*, or the interference with the business of complainant which formed the basis of the injunction, had continued subsequent to the decree made in that year, *or that the conditions existing in 1917 were anything more than a new and independent effort to unionize the mines.*"

Emphasizing the need for tying current activities into the basis or reason for an injunction order, the Sixth Circuit cogently recited that (252 F. 50):

> "If the injunction of 1907 is of its own force applicable to *new conditions* in 1917, no reason appears why it would not be applicable to conditions 20 years, or even 30 years, after the decree is entered . ."

and, continuing (252 F. 51):

> "Under such circumstances the recognition of the power of summary prosecution for contempt, without previous adjudication that the existing conditions are such as to justify injunction . . is fraught with great possibilities for oppression."

Applicable to the instant situation is *Tosh's* further remark (252 F. 50):

> " . . the renewed efforts of the United Mine Workers to unionize the mines . . were not enough to so tie the conditions of *1917* to those existing in *1907* as . . *to make the former but an extension of the strike of 1907* . ."

The enunciation in *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 298, that

> "The injunction which we sustain is *'permanent' only for the temporary period* for which it may last. *It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation"*

accords with *Tosh's* rationale, but is contrary to the Sixth Circuit's action herein.

Reiteration of the *Tosh* doctrine came in *NLRB* v *Reed & Prince Mfg. Co.,* 1 Cir., 196 F.2d 755, 760, where the First Circuit *refused* a petition for adjudication in civil contempt and observed the alleged contumacy *"involves a new and independent set of circumstances unrelated to the unfair labor practices established by" the Court's previous decree.*

So, too, in *NLRB* v. *Pacific Greyhound Lines,* 9 Cir., 106 F.2d 867 (1939), an order against favoring a "company union" was held not violated by favoring, two years later, a different union with which the employer had a

closed-shop agreement on the ground that *an entirely new and different transaction was involved.*

A contrary result was reached in *NLRB* v. *M. Lowenstein & Sons, Inc.*, 2 Cir., 121 F.2d 673, with Circuit Judge Swan dissenting, who observed that a charge "should not serve as a basis for prosecuting, as a contempt of court, an independent unfair labor practice committed years later", noting *Pacific Greyhound Lines, supra,* and observing that "If the later violation is independent of and unrelated to the former, even though of the same general type, the Board should be required to institute a new proceeding of the character provided for by Section 10" (121 F.2d 675). But, it is noteworthy that in a later Second Circuit case (*NLRB* v. *New York Merchandise Co., Inc.*, 134 F.2d 949, 953), it was held that where conditions have changed the hearing must be by the "Board as a Board and not as a master of the court."

The validity of Circuit Judge Swan's dissent is emphasized by the fact that in the years following the 1960 decree's entry, the instant proceeding is the sole time when NLRB has charged the two unions involved had contemned the decree.[15]

Moreover, when unfair labor practice charges were filed with NLRB, the charges related not only to Section 8(b)(7) but also to alleged coercive picketing under 8(b)(1)(A). The alleged coercive conduct, heard by the Sixth Circuit's Master, was linked to, as an integral part of, the alleged 8(b)(7) picketing. NLRB could have, but did not, issue a complaint based upon the 8(b)(1)(A) charges, but came to the Sixth Circuit alleging a civil contempt, despite the fact that in the NLRB hearings of

[15] *NLRB* v. *Local 5881, UMWA*, 6 Cir., 323 F.2d 853 (1963) did not involve either UMW or District 30.

the 8(b)(7) charges the trial examiner admitted in evidence testimony concerning the alleged coercive picketing.[15]

The Sixth Circuit's opinion and judgment violates, too, the admonishment found in *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435, where this Court, though concerned with NLRB's authority to issue an order broadly to obey the statute, admonished that "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and *not found by the Board*". Accord: *Morrison-Knudsen, Inc.* v. *NLRB*, 9 Cir., 270 F.2d 864, 865. It accords, too, with the First Circuit's observation *in Reed & Prince Mfg. Co.*, 196 F.2d 759, that if NLRB elects generally to proceed in contempt, courts of appeals "will gradually supplant the Board as the primary trier of facts when future unfair labor practices are alleged."

III. THE SIXTH CIRCUIT'S REJECTION OF MOOTNESS CONFLICTS WITH DOCTRINAIRE WHICH HAS BEEN WELL SETTLED IN IMPORTANT DECISIONS OF THIS COURT AND IT IS AT VARIANCE WITH DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT.

The Sixth Circuit rejected Unions' assertion of mootness in their motion to discharge and vacate the Rule (*ante*, p. 5-7) because all picketing had ceased prior to NLRB's filing its contempt petition. Though that court reserved the issue when it sustained NLRB's motion for a Special Master, without passing upon the reserved matters, it held petitioners in civil contempt (A. 23a, *et seq.*).

According to the factual narrative in the Master's report, much of the picketing ceased on April 9 and 11, following Beane's advice to discontinue all picketing (A. 9a) and the last event of picketing reported by the Master occurred on May 10 when, as the Master's report

states, "After a visit to the picket line at Lick Branch by Mr. Hobbs, all those assembled, except one picket, departed the scene behind the Hobbs vehicle" and a state police was advised "by a picket that the picketing would be halted" and "Neither the pickets nor the aforementioned sign were afterward observed there" (A. 13-14a).

In *U. S.* v. *United Mine Workers of America,* D.C. Cir., 190 F.2d 865 (1951), the court of appeals, pointing to *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 441, declared that a civil contempt is wholly remedial, to serve only the complainant's purposes, and not to deter offenses against the public or vindicate court authority. There the Government, as complainant, sought by civil contempt to coerce UMW into obeying the restraining order and thus to accomplish the return of miners to their work in the mines. Because these objectives were accomplished when, pending appeal the labor dispute was settled and miners returned to their employment, the District of Columbia Circuit declared that *"under these circumstances the contempt proceeding is moot"* (190 F.2d 873).

Unions had NLRB's word that they had complied with the Sixth Circuit's 1960 decree and for approximately six years thereafter no complaint was made against Unions by NLRB. It is thus evident that at the precise time that NLRB filed its contempt petition all picketing had ceased, and the "end proposed" (*Anderson* v. *Dunn,* 6 Wheat., 204, 231, 5 L.ed 242) by the civil contempt proceedings had eventuated and there was then no remedial sanction for the Sixth Circuit to impose. Since civil contempt's function, namely, "coercion to compel the contemnor to do what the law requires of him", was precisely what Petitioners were doing when NLRB's peti-

tion was filed with the Sixth Circuit (see *Penfield Co.* v. *Securities and Exchange Commission,* 330 U.S. 585, 593), the Sixth Circuit's opinion and judgment herein were directed to a nonexistent situation and to the achievement of a status that already existed. It is thus manifest that NLRB asked the court, in the proceeding's inception, to deal with an abstraction and to do a useless thing.

Gompers' language (221 U.S. 451) is apposite:

> ". . But the very amplitude of the power [of punishing for contempt] is a warning to use it with discretion, and *a command never to exert it where it is not necessary or proper. For that reason we can proceed no further in this case, because it is both unnecessary and improper to make any decree in this contempt* proceeding.
>
> . . . . . .
>
> "But, as we have shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and *when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part.*"

As *U. S.* v. *United Mine Workers of America* avowed, "under these circumstances the contempt proceeding is moot" (*ante,* p. 36), the Sixth Circuit should not have accepted jurisdiction in this case. The undisputed facts make manifest its error in the issuance of its decision of contempt, and particularly its issuance of sanctions against Petitioners.

IV. SANCTIONS IMPOSED BY THE SIXTH CIRCUIT'S OPINION AND JUDGMENT DO NOT ACCORD WITH THIS COURT'S PRIOR DECISIONS IN CIVIL CONTEMPT CASES. THE OPINION AND JUDGMENT ERRONEOUSLY EXPAND THE ENFORCEMENT ORDER.

A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, as expressed in *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590; *McCrone* v. *U. S.,* 307 U.S. 61, 64; *Gompers* v. *Buck's Stove and R. Co.,* 221 U.S. 418, 441. Accord: *Nelson* v. *Steiner,* 7 Cir., 279 F.2d 944 (1960); *U. S.* v. *UMWA,* D.C. Cir., 190 F.2d 865 (1951). Under undisputed evidence, no remedial action was essential when the petition was filed. Moreover, since complainant is NLRB, a remedial fine is limited to costs and necessary expenses to prosecute the contempt petition. Such a fine would have been appropriate had it been *necessary* for the Board to take this action to require that alleged contemnors cease certain conduct. As already pointed out (*ante,* pp. 6, 7, 34), NLRB was already processing an unfair labor practice charge based upon precisely the same facts presented in the instant action. NLRB now seeks enforcement of its adverse order to UMW in the 8(b)(7) case in *NLRB* v. *District 30, UMW, et al.,* No. 18,383, in the Sixth Circuit. NLRB has, in effect, prosecuted an unfair labor practice case under guise of contempt.

Moreover, since the instant Sixth Circuit order imposes a conditional $25,000 fine and $1,000 per day on Union Petitioners, and $5,000 or imprisonment of "30 days for each such violation" upon individual Petitioners (A. 29a), for which there is no evidentiary warrant, both Union and individual Petitioners must conduct their duties under threat of fine or, in the case of the individuals, imprisonment for conduct of people over whom they have

no control and for conduct of which they may have no knowledge, committed by unknown persons, leaving to each a hope that a future trier of facts would disbelieve testimony of employers involved in a unionizing campaign. The Sixth Circuit has indulged in pure legalism to inflict punishment upon Petitioners whose conduct otherwise could not be attacked. Since civil contempt is wholly remedial, inclusion of the enormous fines poses inquiry whether payment is to the court or NLRB. If to the former, *Penfield, Gompers* and other federal cases cited condemns it.

Similar threat is found in the Sixth Circuit's order wherein it provides that future violations will cause the court to deal therewith by such other means as it deems appropriate, including issuance of a body attachment against persons responsible for noncompliance (A. 29a). *Gompers* rejects such a provision in a civil contempt proceeding. Nothing in the record supports this provision; and, since this is the first instance since 1960 that NLRB has suggested a violation of the 1960 decree so far as Union Petitioners are concerned, language found in *NLRB* v. *Reed & Prince Mfg. Co.* (196 F.2d 755) is meaningful where it says "the present does not seem to be a case of a repeated offender, playing hide-and-seek with the Board in the manner suggested." Threat of imprisonment is indeed more appropriate in criminal contempt proceedings where the law provides procedures totally different from those in civil contempt and protective of those charged with contempt. Inclusion of the provision in the instant case suggests pre-judgment by the Sixth Circuit and lack of due process.

NLRB's original order, enforced by the 1960 decree, was limited to "employees . . of any employer . . of Dis-

trict 30's territorial jurisdiction (A. 35a). The instant order expands NLRB's original order by requiring Petitioners to purge themselves by ceasing to restrain and coerce employees of Terry Elkhorn, Mahan and Wright *"or of any other employers"* within District 30's jurisdiction (A. 27a). The Sixth Circuit thus goes beyond the scope of the petition, the hearing and evidence, which *NLRB* v. *Express Publishing Co.*, 312 U.S. 426 and *Communications Workers* v. *NLRB*, 362 U.S. 479 condemns. The Fifth Circuit's *NLRB* v. *Local 926*, 5 Cir., 267 F.2d 418, 421, appropriately notes that "more important, and basic to a fair administration of the Act", is "the hard-won principle of Anglo-American law that a judgment must find adequate support in the record." An order of a court "that goes beyond the record to penalize an offender as a bad actor smacks too much of attainder to be acceptable . ." The foregoing condemns also the Sixth Circuit's inclusion in the order which mandates that Petitioners purge themselves by not *"Violating in any other manner this Court's decree of May 20, 1960"* (A. 28a).

In any event, the order lacks the support of clear and convincing proof as required by Norris-LaGuardia's Section 6 and other applicable law.

CONCLUSION

For the reasons assigned, Petitioners, and each of them, pray that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the opinion and judgment of the Sixth Circuit, entered in Case No. 14,226, on April 18, 1968, as aforesaid.

Respectfully submitted,

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